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The Human Rights Monitor

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Executive Director's Desk



Amber D. Gooding

It is with great pleasure that I write this article for the first edition of *The Human Rights Monitor*. When I was appointed as the executive director of the Tennessee Human Rights Commission, I found that many people had never heard of the Commission or were simply not sure of its role. That's why I

have made it one of my goals to increase the Commission's visibility and to find better avenues of communicating the Commission's successes.

The Human Rights Monitor is the first in this initiative. This quarterly newsletter is designed to publicize changes in employment and housing laws, recognize staff who have excelled in their duties, highlight case settlements, communicate past or upcoming education and outreach efforts, and most importantly, educate the citizens of Tennessee on their rights to ensure that discrimination is eradicated in this great state.

In 2003-2004, the Commission will work with a public relations firm to effectively communicate the

state's anti-discrimination message. Through the use of news bureaus, town hall meetings, and several planned partnership initiatives with grass-roots organizations throughout the state, the citizens, proprietors and employers will learn what services the Commission provides, what legal redresses are available, and much more.

I encourage you, our readership, to contact us with your comments, questions and suggestions. Cynthia Howard, THRC's Communications Officer, can be reached at 615-253-1608 or you may email her at Cynthia.Howard@state.tn.us.

We look forward to hearing from you.

General Counsel's Corner



Scott Mayer

by Scott Mayer

A fair amount of confusion exists over what constitutes sexual harassment and when an employer can be held liable for

sexual harassment occurring in the workplace. The Tennessee Human Rights Act (THRA) and Title VII of the Civil Rights of 1964 both prohibit an employer from subjecting an employee to disadvantageous terms and conditions of employment because of gender, which includes sexual harassment. This article will explore what actions constitute sexual harassment under the law and when an employer can be held responsible for such harassment.

It is probably easier to define sexual harassment by giving examples of what it is not. Off-

color jokes or offhand comments; simple teasing; profane language; boorish or sophomoric behavior; and asking a co-worker for a date generally do *not* constitute sexual harassment. Courts frequently remind us that discrimination laws are not "general civility" laws intended to ensure that the workplace is harmonious, pleasant, and void of banter between male and female coworkers. However, none of these things are good ideas in today's workplace, as

they are likely to engender bad feelings and inevitable (though probably unsuccessful) litigation.

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment (an environment that a reasonable person would find hostile or abusive) is neither covered nor prohibited by the THRA or Title VII. In evaluating whether harassment crosses the “severe or pervasive” threshold, courts consider all of the circumstances surrounding the alleged conduct. Some of the factors considered in this evaluation include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; whether it unreasonably interferes with an employee’s work performance; and the effect on the employee’s psychological well-being. Generally speaking, the fewer the number of alleged incidents of harassment, the harder it is to successfully establish sexual harassment, although courts have determined that a single severe incident, such as a sexual assault, can constitute actionable harassment.

Liability for sexual harassment largely depends on the employer’s reaction to a harassment complaint as well as whether the harasser is a co-worker or a supervisor. If the harasser is a co-worker, the employer is only liable for the harassment if it knew (or should have known) of the harassment but failed to respond with prompt and appropriate action designed to stop it. For instance, an employer that quickly responds to a complaint of co-worker sexual harassment by requiring the harasser to attend sexual harassment training and by

warning the co-worker that any future harassing conduct against the victim (or anyone else, for that matter) will result in termination has likely fulfilled its duty to take reasonable remedial action and would not be liable for the harassment. Employees with sexual harassment complaints often do not understand that the employer gets a chance to “fix” the problem, and that liability is only imposed if the employer fails to attempt to remedy the situation. Also frequently misunderstood is the fact that the employer need not terminate the offending employee if the remedial action taken is reasonably designed to prevent future harassment.

Liability can be quite different if the harasser is a supervisor. If a supervisor sexually harasses an employee and then takes an adverse employment action against that employee (such as termination), the employer is *automatically* liable for the harassment of the supervisor. If no adverse action is taken against the employee, liability depends on whether the employer took reasonable steps to prevent and correct promptly the harassment and whether the employee unreasonably failed to take advantage of any preventative or corrective procedures provided by the employer to address harassing conduct. In other words, an employee who fails to invoke his or her employer’s sexual harassment complaint policy will find it difficult, if not impossible, to later recover damages for sexual harassment. A recent case handled by the Commission illustrates the issues involved in a typical sexual harassment complaint and the pitfalls that exist for employers who fail to take prompt, remedial action.

A female employee in Tennessee worked in her employer’s industrial production facility. She alleged that a co-worker had harassed her on several occasions by exposing himself and demanding sex. The alleged harasser had apparently engaged in this same type of behavior before with other employees, as well as inappropriate touching and grabbing. He had also previously been counseled and disciplined for his conduct. When the female employee casually reported the first incident some months after the fact, she was not believed. Subsequent reports of similar harassment were not promptly acted on, with the employer first proposing to move the female employee to another shift or location, and then later requesting she undergo a lie detector test to “prove” her allegations because her coworker denied them. In the meantime, the alleged harasser was inexplicably moved into a supervisory position over the female employee. The final act of harassment occurred when the alleged harasser followed the female employee into the ladies restroom, locked the door, exposed himself and again demanded sex. The female employee physically defended herself, and her harasser fled the scene only to resign a short time later.

While not every allegation of sexual harassment is so clear-cut, the employer in this case clearly incurred liability for harassment. The female employee did delay reporting some of the early instances of harassment. However, when she did report these incidents, the employer took no real or effective action designed to prevent additional harassment from occurring. Incredibly, the employer even placed the alleged harasser in a

supervisory role over the female employee, furthering the potential for additional, more serious acts of harassment. I think it safe to say that a supervisor’s repeated acts of exposing himself to an employee and demanding sex, culminating in what is arguably a sexual assault, constitutes severe and pervasive conduct by anyone’s definition of sexual harassment. Apparently, the employer agreed, as it conceded that harassment had, in fact, occurred, but argued that it believed it had taken the necessary steps to avoid liability in the short time between the different incidents. While not admitting liability, the employer elected to utilize the Tennessee Human Rights Commission’s mediation program and to ultimately settle the harassment charges against it for the sum of \$90,000; a settlement it likely would have avoided entirely if it had quickly and definitively acted on the allegations of harassment.

“Employees with sexual harassment complaints often do not understand that the employer gets a chance to “fix” the problem, and that liability is only imposed if the employer fails to attempt to remedy the situation.”

State Farm Employees Get a Lesson on the State's Anti-Discrimination Laws

by Robert Bright



Robert Bright

In December, Robert Bright, THRC's Housing Coordinator, spoke to an audience of State Farm employees at a *Lunch and Learn Informational Forum* hosted by the Mid-America Zone Universal Declaration of Human Rights Committee in recognition of human rights month.

Bright offered practical guidance on non-discrimination in recruitment, selection and hiring as he outlined the federal and state anti-discrimination laws in employment.

Bright discussed the federal and state laws that govern the country's anti-discrimination policies in housing and employment. He stated that both practitioners and laymen should view the goal of equal opportunity not only as a "civil" right but as a "silver" right as well.

After Bright's presentation, he held a question and answer session. Amber Gooding, THRC's Executive Director, and Cynthia Howard, THRC's Communications Officer, participated in the session.



Everyone Wins in Mediation

by Dale Robinson

The Commission's mediation program continues to provide parties a faster redress for complaint resolution. During the previous federal reporting year, 11 of the 20 employment cases that were referred to mediation were resolved with an agreement being reached between the parties. All of the housing cases referred to mediation were resolved with an agreement. This means that the parties reached an agreement in close to 70% of the cases where mediation was agreed to and attempted.

Below are several illustrations of the cases mediated.

- An employee at a manufacturing facility alleged she was subjected to sexual harassment. The harassment involved both physical contact and verbal, sexual comments. The terms of the agreement included a financial settlement and the offending employee resigned his employment.
- A non-profit advocacy organization alleged that an apartment complex, which was

designed and constructed after the effective date of the Americans with Disabilities Act in 1991, did not meet the federally mandated design and construction guidelines. The owner asserted that the property was purchased from the original owner who had not designed nor constructed the property within established guidelines. The organization and the property owner developed and implemented a construction plan to correct the alleged construction violations to ensure that residents with disabilities were afforded the opportunity to access the property and all services extended to residents.

- An employee alleged that she was laid off from employment based on racial discrimination. The employer responded that the layoff was based on a legitimate business decision. The complainant had secured a new position with another company and was concerned about her professional reputation. As part of the agreement, the

employer provided the complainant with a letter confirming that the layoff was based on financial constraints and that, in no way did the layoff reflect on the complainant's job performance. The employer also placed an article in its employee newsletter stating that the employee had accepted another position with another company, thanking her for her work with the company and wishing her the best of success in her new role.

Some of the benefits of using mediation to address employment and housing discrimination complaints include:

- There is no fee for the service to the parties
- Participation in the process is voluntary
- The assigned mediator has training and experience. The role of the mediator is as a "third party neutral" party.
- The parties are free to discuss the complaint and

possible resolution options in a confidential setting.

- The mediator has no prior or future investigative role in the investigation (if one resulted).
- The options for resolution, i.e. "relief," can go beyond what may otherwise be available from the Commission or in court.
- The mediation session is scheduled for ½ day and is held in close proximity to the parties to save them travel time and expense.
- The terms are more flexible than may otherwise be available from a judicial or administrative process. The parties are in control of the terms and, as long as the terms are not illegal, the terms can be agreed to.

Overall, the agreements reached between the parties amounted to nearly \$320,000 in monetary value.

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THE HUMAN RIGHTS MONITOR

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If you would like more information on your rights, the federal and state laws that protect you or would simply like to have a member of our staff speak to your group or organization, contact Cynthia Howard at 615-253-1608.

We hope you have enjoyed the THRC's e-newsletter. Become a subscriber today. Just forward your email address to:
Cynthia.howard@state.tn.us

Visit Our Website
www.state.tn.us/humanrights

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We are committed to serving the citizens of Tennessee.

TENNESSEE HUMAN RIGHTS COMMISSION

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Mission Statement

The Tennessee Human Rights Commission is unified in its commitment to exemplify and promote understanding, fairness, justice and equality of opportunity for human rights among all people; and to provide the citizens of Tennessee with guidance and support to assist in the achievement of our vision.

On the Calendar

Race Relation Summit, Hosted By the NAACP

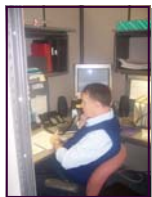
Friday, February 27, 2004, 5:30 pm & Saturday, February 28, 2004, 8:30 am-4:30 pm.
On the Campus of Jackson State Community College, Jackson, TN
Tennessee Human Rights will be participating in the Town Hall meetings.

Knoxville Area Fair Housing and Equal Opportunity Conference, Sponsored by the Equality Coalition For Housing Opportunities (ECHO) & THRC

Friday, April 2, 2004, 7:30 am-3:30 pm, Rothchild Catering and Conference Center
8807 Kingston Pike, Knoxville, TN

Staff Highlights

by Cynthia Howard



Ron Hardaway

has served in many capacities at the Commission since joining its ranks 24 years ago. His years of experience and wealth of knowledge about the investigative process and employment law has served the Commission well.

On January 31, 2004, Hardaway will be retiring. When asked about his future plans, Ron smiles broadly

and says, "I plan to travel extensively throughout England and France."

Although he gives a 'daily countdown', he's not fooling us. We know that he'll miss us as much as we'll miss him.



Shay V. Rose, a 2001 graduate of the UT College of Law, joined the Commission

in December 2003. Prior to joining the THRC, Rose served as an associate attorney with the firm of Blackburn and McCune in Knoxville, where she did civil litigation.

The newly appointed Associate General Counsel says of her position, "I'm looking forward to the challenges of working with discrimination issues and greatly contributing to the continued success of the agency."